SUPREME COURT, U. S.

AUG 31 1970

E. ROBERT SEAVER, CLERK

No. 238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

OLSON BODIES INC., formerly GRUMMAN ALLIED INDUSTRIES, INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA (UAW)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF OLSON BODIES INC.

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Olson Bodies Inc., formerly Grumman Allied Industries, Inc.,

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—v.—

National Labor Relations Board and International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY MEMORANDUM OF OLSON BODIES INC.

Petitioner Olson Bodies Inc., formerly Grumman Allied Industries, Inc. (hereinafter the "Company"), respectfully submits this memorandum in reply to the memoranda of the Solicitor General, on behalf of the National Labor Relations Board, and of the UAW.

I.

The Solicitor General in his memorandum has suggested that a decision of this Court in *Magnesium Casting Company* v. *NLRB*, No. 370, 1970 Term, might be dispositive of

Point I of the Petition in the instant case.* As the Solicitor General notes (p. 2), the question presented—whether the Board is required to review a Regional Director's underlying representation decision in a subsequent unfair labor practice proceeding—is one which should be decided by this Court.

If this Court grants certiorari in No. 370 and adopts the view taken by the First Circuit, this, of course, would be dispositive of Point I of the instant Petition. If, however, this Court grants certiorari in No. 370 and adopts the contrary view taken by the Second Circuit in *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB*, 409 F. 2d 676 (2d Cir.), *cert. denied*, 396 U.S. 906 (1969), there would still remain a question of sufficient importance to warrant definitive determination by this Court—whether plenary Board review is required in all cases or only where the issue involved is said to be "difficult and requires a fine-drawn balancing of facts and law." If this crucial subordinate point is not decided by this Court, any decision that plenary Board review is required may well be readily circumvented and thus prove illusory in practice. The result is likely to be extensive litigation as to when, and under what circumstances, plenary review is required by the Board.

In this respect it should be noted that the First Circuit has already rejected the proposition that Board review should be limited to "difficult" cases:

> "We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of 'supervisory' status, the question seemed difficult only with regard to one of the three assistant foremen. . . . Surely that approach would frustrate rather

* The Solicitor General in his memorandum (pp. 1-2) states that the first question presented herein "is essentially the same as that presented in *Magnesium Casting Company* v. *National Labor Relations Board*."

than foster the expeditious disposition of cases intended by Congress." (74 L.R.R.M, at 2239)

As the First Circuit pointed out, the status of a single employee can raise problems of law and fact which are just as difficult as those involved in determining the status of a larger group of workers as employees or independent contractors, the issue in *Pepsi-Cola*.

II.

The Company's contention that absentee balloting should have been permitted under the circumstances of this case cannot be lightly dismissed as the memoranda of the Solicitor General and the UAW attempt to do. Counsel for the UAW has suggested that the cases cited in the Company's Petition represent exceptions to a stated Board policy of not permitting absentee balloting rather than examples that such balloting is permitted generally. Although in some instances the Board has suggested that absentee balloting is not to be generally employed, the very large number of cases in which it has been allowed indicates that the Board has little actual regard in practice for its statement of general policy.

On the other hand, if it is indeed the Board's general policy not to allow such absentee voting in circumstances such as those of the instant case, the Board has abused "its discretion when it knowingly allows eligible employees to be disenfranchised . . . whose vote would change the results of an election to decide upon a bargaining agent." *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933, 944 (5th Cir. 1959).

Neither *NLRB* v. *A. J. Tower Co.*, 329 U.S. 325 (1946), nor *IT&T Corp.* v. *NLRB*, 294 F.2d 393 (9th Cir. 1961), cited at page 3 of the Solicitor General's memorandum,

contradicts the Company's position or even deals with the question involved in this case—whether the Board has abused its discretion by disenfranchising eligible but ill employees where a request was made for absentee ballots *prior* to the election. Both those cases dealt with facts which came to light *after* the election, a very different situation than involved herein.

The UAW in its memorandum (p. 17) suggests that regardless of Board policy, the Company's request for absentee ballots was not timely. At no time throughout these proceedings has the Board ever disputed the timeliness of the Company's request, and as this Court noted in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."

Similarly, in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965), this Court stated that:

> "[T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalization for agency action. . .'"

It should also be pointed out that the Company's request for absentee balloting was prompted by an inquiry from a sick employee, and that the request was telephoned to the Regional Director immediately following the inquiry.

III.

The Company does not quarrel with the proposition that a hearing is not required when there are no "substantial or material factual issues" in dispute. In the instant case, however, there is, at the very least, a disputed question of fact

involving Davenport's supervision. As noted in the Petition herein, the question of Davenport's supervision is critical because the Regional Director's conclusion that Davenport was not a plant clerical was based, in large part, on his finding that "Davenport's immediate supervisor is Engineer Harold Turner." Every affidavit known to the Company stated that Simmons was Davenport's supervisor. In the face of these affidavits, the only way that the Regional Director could have found that Turner was Davenport's supervisor was either to have disbelieved every affidavit or to have obtained information not made available to the Company. In either case, a hearing is required.

The Regional Director began his Supplementary Decision by stating that the Union contends that "Davenport is a liaison man between the engineering and drafting departments and is not part of the production and maintenance unit." The UAW in its memorandum would seem to suggest that this contention was made in "[t]he charging party's motion to dismiss the objections to the conduct of elections, dated March 6, 1967" (p. 5). However, the motion to dismiss (reprinted in full in Appendix A hereto) contains no such contention. The Company still has no idea how the Regional Director learned that the Union contended that Davenport was "a liaison man between the engineering and drafting departments," and neither the Solicitor General nor the UAW has provided anything resembling a satisfactory answer. The Company can only conclude, as it did in the Petition herein, that the Regional Director obtained such information from sources never disclosed to the Company. Denial of a hearing under these circumstances is a clear violation of due process.

CONCLUSION

For the reasons set forth herein and in the Petition, a Writ of Certiorari should issue.

Respectfully submitted,

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August 31, 1970

APPENDIX A

APPENDIX A

Motion to Dismiss Objections to the Conduct of Election and to the Conduct Affecting the Results of Election

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

Case No. 3-RC-4023

GRUMMAN ALLIED INDUSTRIES, INC.,

Employer,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Petitioner.

The undersigned, as attorney for the Petitioner herein, moves to dismiss the Objections to the Conduct of Elections and the Conduct Affecting the Results of Elections heretofore filed by the employer in the above matter on the following grounds:

1. Objection No. 1 is improper. The provisions of the National Labor Relations Act, as amended, as well as the Rules and Regulations of the National Labor Relations Board, do not provide or permit absentee voting or voting by proxy. The refusal of the Regional Director to permit such voting was proper and Objection No. 1 should be dismissed.

2. Objection No. 2 does not state any facts to be considered. It is merely a conglomeration of conclusions of law without one single allegation of fact in support thereof. The Rules, (Section 102.69) specifically provide that the Objection must contain a statement of the reasons. A conclusion of law without at least an alleged fact upon which to base such conclusion is insufficient both in the sense of being investigated by the Board agency or to reply by the adverse party.

Dated: New York, N.Y.,
March 6, 1967.

/s/ BENJAMIN RUBENSTEIN
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